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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

BERNIE PIOTROWSKI,
AMERICAN NATIONAL BANK AND TRUST COMPANY,
STEVE MARTELL, PAXTON LANDFILL CORPORATION,
and STRYKER INTERNATIONAL INCORPORATED,
Petitioners,

v.

CITY OF CHICAGO, a municipal corporation,
Respondent.

On Petition for a Writ of Certiorari to the Appellate Court of Illinois

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BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the operator of a permitless landfill can assert as a defense in an action to enjoin further permitless operation that its application for a permit was unconstitutionally denied when it failed to exhaust its administrative remedies concerning that denial.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
STATEMENT	1
ARGUMENT	3
PAXTON'S FAILURE TO EXHAUST ITS ADMINISTRATIVE REMEDIES PRECLUDES IT FROM SUCCESSFULLY DEFENDING AN ACTION SEEKING TO ENJOIN ITS UNLAWFUL OPERATION OF A PERMITLESS LANDFILL	3
CONCLUSION	6

TABLE OF AUTHORITIES

CASES:	Page
American National Bank & Trust Co. v. City of Chicago, 132 Ill. App. 3d 570, 478 N.E. 2d 1 (1985)	2
American National Bank & Trust Co. v. City of Chicago, 826 F.2d 1547 (7th Cir.), cert. denied, 484 U.S. 977 (1987)	2, 4-5
Bordenkircher v. Hayes, 434 U.S. 357 (1978)	5
Michigan v. Long, 463 U.S. 1032 (1983)	3
Poulos v. New Hampshire, 345 U.S. 395 (1953)	4
Wayte v. United States, 470 U.S. 598 (1985)	5
STATUTORY PROVISION:	
28 U.S.C. § 1257	3

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OPINIONS BELOW

The opinion of the Illinois Appellate Court is reported at 215 Ill. App. 3d 829, 576 N.E.2d 64 (1991), and is reprinted at Pet. App. A. 1-A. 9.

The oral ruling of the Circuit Court of Cook County, Illinois, has not been reported. It is reprinted at Pet. App. A. 31-A. 42.

STATEMENT

Since 1984, Paxton Landfill Corporation has operated a landfill in the City of Chicago without a permit. Pet. App. A. 1-A. 5. As the appellate court noted in its opinion, this violates no fewer than three ordinances of the

City of Chicago. Pet. App. A. 8. Paxton has been unable to obtain the requisite permit because the City's Zoning Board of Appeals has twice rejected its application for a special use variance, first in 1984 and later in 1989, that would allow the issuance of a permit for Paxton's site. Pet. App. A. 2-A. 4. Paxton has continued to operate while employing litigation as a delaying tactic. In its first case, it sought administrative review of the Zoning Board of Appeals' 1984 decision, only to have the action dismissed because of its failure to comply with the Illinois Administrative Review Act. See *American National Bank & Trust Co. v. City of Chicago*, 132 Ill. App. 3d 570, 478 N.E. 2d 1 (1985). Paxton then initiated federal litigation, claiming that the Illinois courts' refusal to consider its administrative review action on its merits violated the United States Constitution. That lawsuit was held to be barred by the prior state litigation. See *American National Bank & Trust Co. v. City of Chicago*, 826 F.2d 1547 (7th Cir.), cert. denied, 484 U.S. 977 (1987). At that point, the City brought this case against petitioners in order to enjoin further illegal operations at the Paxton Landfill.

Paxton responded to the City's lawsuit in two ways. First, it made its second application for a special use variance. After that application was denied, Paxton challenged the denial by filing another action seeking administrative review, which remains pending in the Circuit Court of Cook County, Illinois. Pet. App. A. 3-A. 4. Second, Paxton forwarded as affirmative defenses in this enforcement action that the City's refusal to grant it the variance deprived it of due process and equal protection. The circuit court struck those affirmative defenses, granted summary judgment, and entered an injunction prohibiting further operation of the landfill. The appellate court affirmed, relying on the settled principle that Paxton could challenge the denial of its application only through the administrative process, and not through a collateral attack. The Supreme Court of Illinois subse-

quently denied Paxton's petition for leave to appeal to that court.

ARGUMENT

PAXTON'S FAILURE TO EXHAUST ITS ADMINISTRATIVE REMEDIES PRECLUDES IT FROM SUCCESSFULLY DEFENDING AN ACTION SEEKING TO ENJOIN ITS UNLAWFUL OPERATION OF A PERMITLESS LANDFILL.

Petitioners now challenge neither the ordinances requiring Paxton to obtain a permit before it can lawfully operate a landfill in the City of Chicago, nor the finding of the lower courts that Paxton operates its landfill without the requisite permit. Rather, petitioners contend that Paxton need not obtain the required permit because the City of Chicago unconstitutionally denied its applications. Unfortunately for Paxton, it has not availed itself of the mechanism provided by Illinois law for challenging the denial of such an application—a petition for administrative review from the denial decision itself. Because Paxton has failed to exhaust its available administrative remedies under state law, there is a state-law procedural bar to its attack on the denials, and hence no federal question presented by this petition. Nor is the United States Constitution offended by the application of this straightforward rule of state law to Paxton's case.

1. The jurisdiction of this Court, of course, is limited to the review of questions of federal law. See 28 U.S.C. § 1257. Accordingly, when the decision of a state court rests on an adequate and independent state-law ground, this Court lacks jurisdiction over the case. *E.g.*, *Michigan v. Long*, 463 U.S. 1032, 1038-41 (1983). Even a cursory review of the opinion of the Illinois Appellate Court in this case makes clear that it decided no question of federal law. The appellate court simply followed the settled rule of Illinois law that the only appropriate venue for challenging the administrative denial of an application is through the administrative review process, and

not through a collateral attack on that denial in separate litigation. Paxton's original application was denied in 1984, and it failed to perfect its administrative review action. That being the case, it had no continued right to operate a permitless landfill. In 1989, Paxton filed a second application, and again sought administrative review of that denial, but thus far it has failed to obtain relief. Paxton may not use federal constitutional grounds as a substitute for complying with the rules found in Illinois law concerning administrative review.

Petitioners contend that the appellate court's refusal to reach their federal claims is unconstitutional in itself. That is simply wrong. In fact, this Court has squarely addressed this precise question. In *Poulos v. New Hampshire*, 345 U.S. 395 (1953), the Court upheld the conviction of a defendant charged with conducting an outdoor meeting without obtaining a required license in the face of his claim that an application for a license had been arbitrarily and unconstitutionally denied. The Court held that because Poulos had not complied with the available procedures for applying for licenses and obtaining review of denials, he was barred from challenging that denial on federal constitutional grounds.

Because Paxton's failure to exhaust its administrative remedies constitutes an independent and adequate state-law ground for a decision, and indeed a ground which this Court has already held sufficient to insulate the denial of an application from federal constitutional challenge, this petition is insubstantial. While petitioners seem to claim that the state courts have somehow prevented them from raising a federal claim, there is no support for that assertion. In 1984, Paxton had a full opportunity to obtain judicial review of the denial of its initial application, but failed to do so. The Seventh Circuit has already held that Paxton's failure to comply with the Illinois Administrative Review Act precluded any subsequent attempt to attack that denial on federal grounds. See *American National Bank & Trust Co. v. City of Chi-*

cago, 826 F.2d 1547 (7th Cir.), cert. denied, 484 U.S. 977 (1987). Having had its opportunity to contest the 1984 denial, Paxton is not entitled to continued permitless operation until it receives a second bite at the apple. None of the decisions on which petitioners rely even remotely addresses the question whether the denial of an application may be collaterally attacked on federal constitutional grounds when the applicant has failed to exhaust available state-law remedies for challenging the denial.

2. Even if the defense of selective prosecution in violation of equal protection and due process were available to petitioners, it would be insufficient. While petitioners argue strenuously that their discriminatory enforcement claim should be heard in this action, nowhere in the petition do petitioners state what that claim is. To state a claim for selective prosecution, petitioners must establish that the decision to prosecute was "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." *Wayte v. United States*, 470 U.S. 598, 608 (1985) (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978)). Petitioners never identify what unjustifiable standard they believe was utilized in this case. The petition itself says nothing on the subject. The pleadings attached to the petition identify two other landfills in Chicago that have acquired special use variances, and assert disparate treatment by the Zoning Board of Appeals regarding the issuance and review of special use variances. The pleadings also concede, however, that those landfills have permits. That eliminates any possibility for a meritorious claim of selective prosecution. Petitioners do not claim that the City of Chicago has failed to prosecute other permitless landfills; and indeed only Paxton is operating without a permit. Because no other putative defendant is similarly situated to Paxton, there can be no basis for a claim of selective prosecution. Petitioners were prosecuted because they run a permitless landfill—that is not an arbitrary or discriminatory basis for prosecution. The only

relevant claim petitioners do make is that Paxton should have received the type of variance granted to the two other identified landfills. That claim, as the appellate court concluded, is not a claim involving selective prosecution, but rather a claim of disparate treatment by an administrative agency, the Zoning Board of Appeals, and should be heard in an administrative review action challenging the decision of that agency, and not in this case.

3. Petitioners have accordingly failed to demonstrate any justification for this Court's review. They have not demonstrated the existence of any conflict in the lower courts over whether an exhaustion rule such as that used in Illinois violates any federal rights, that the question presented by this petition is of general importance, or even that the exhaustion rule utilized in Illinois did not afford petitioners an adequate opportunity to raise their federal claims. There is accordingly no basis for review under this Court's rules.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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